91-1330

Supreme Court, U.S.
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CASE NO.

in the Supreme Court of the United States

October Term 1991

ERNEST FRANZ COMBS, JR. and
PATRICIA ANN HAYES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FIFTH AMENDMENT RIGHTS OF ERNEST FRANZ COMBS, JR. WERE VIOLATED WHERE HE GAVE IMMUNIZED TESTIMONY BEFORE A FEDERAL GRAND JURY; WAS SUBSEQUENTLY INDICTED FOR CRIMES ABOUT WHICH HE TESTIFIED; WAS DENIED A *KASTIGAR* HEARING; AND THE GOVERNMENT NEVER PROVED THAT ALL ITS EVIDENCE WAS DERIVED FROM SOURCES INDEPENDENT OF COMBS'S GRAND JURY TESTIMONY.

II. WHETHER THE FOURTH AMENDMENT RIGHTS OF ERNEST FRANZ COMBS, JR. AND PATRICIA ANN HAYES WERE VIOLATED BY THE INTERCEPTION OF THEIR TELEPHONE CONVERSATIONS PURSUANT TO A WIRETAP THAT WAS THE PRODUCT OF A JOINT VENTURE BETWEEN THE SPANISH POLICE AND DEA.

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ORDER BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed, *per curiam*, the trial court's refusal to hold a *Kastigar* hearing and its denial of Petitioners' motion to suppress wiretap evidence. The *per curiam* affirmed decision of the Eleventh Circuit is reprinted in the Appendix.

JURISDICTION

This Petition arises from a criminal indictment filed against Ernest Franz Combs, Jr. and Patricia Ann Hayes in the United States District Court for the Southern District of Florida. The indictment charged Ernest Franz Combs, Jr. and Patricia Ann Hayes, *inter alia*, with substantive RICO and conspiracy to commit RICO in violation of 18 U.S.C. § 1962(c) and (d), respectively. In addition, HAYES was charged with one count, and COMBS with two counts, of conspiring to import hashish in violation of 21 U.S.C. §§ 959, 952 and 963.

Ernest Franz Combs, Jr. and Patricia Ann Hayes were convicted on all counts. They appealed the judgment of conviction to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291.

On September 9, 1991, the Eleventh Circuit issued a decision affirming the trial court, *per curiam*. COMBS and HAYES filed a petition for rehearing and/or suggestion for rehearing in banc. On November 15, 1991, the Eleventh Circuit denied the petition for rehearing and suggestion of rehearing in banc.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISIONS

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against the unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CASE NO.

in the Supreme Court of the United States

October Term 1991

ERNEST FRANZ COMBS, JR. and
PATRICIA ANN HAYES[1],

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Ernest Franz Combs, Jr. ("COMBS") and Patricia Ann Hayes ("HAYES"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

[1]The Appellants in the Eleventh Circuit were COMBS and HAYES. The government was the Appellee. There were 20 defendants named in the original indictment. COMBS and HAYES were tried with three other co-defendants. At the time of trial, most of the remaining defendants were either in the process of being extradited or were fugitives.

STATEMENT OF THE CASE

This case involves an international conspiracy for the importation of hashish and marijuana into the United States allegedly involving an organization headed by Dennis Howard Marks (the "Marks Organization"). COMBS and HAYES were alleged to have participated in the activities of the Marks Organization.

I. The *Kastigar* Violation

In November, 1987, federal agents served a subpoena upon COMBS directing him to appear before a federal grand jury in the Northern District of California. Special agents of the Federal Bureau of Investigation and attorneys from the United States Department of Justice interviewed COMBS in advance of his grand jury appearance.

On December 15, 1987, the government, by letter agreement, gave COMBS use immunity. The government also agreed that none of the evidence COMBS provided would be used against HAYES, who is COMBS's common law wife. COMBS then went into the grand jury and testified.

COMBS's grand jury testimony included his role in a shipment of hashish seized at the Naval Air Reworks facility in Alameda, California on December 12, 1984 (the "Alameda Shipment"). He testified he was approached to arrange "a connection" to obtain hashish to ship to Alameda, California; that Dennis Howard Marks supplied the hashish and arranged for delivery to Alameda; and that Marks and COMBS were to have received 1,000 pounds of hashish, but never received anything.

COMBS also testified in great detail about his and Marks's involvement in a load of hashish imported into the

United States via the vessel "Axel-D" (the "Axel-D Shipment"). He testified he introduced Marks to one of the alleged co-conspirators for the purpose of importing marijuana on the Axel-D. COMBS also testified to having invested money in the Axel-D Shipment.

After COMBS testified, a person named Robert Stephenson learned COMBS had been cooperating with the government. In May, 1988, Stephenson testified in the grand jury in the Southern District of Florida that ultimately indicted COMBS and HAYES. Stephenson testified about COMBS's role in the Alameda Shipment. Until COMBS appeared before the grand jury in California, the case surrounding the Alameda Shipment had reached a dead-end with no leads. There is no indication the government had any idea who Robert Stephenson was. Yet, within five months after COMBS testified in California, Stephenson was testifying against COMBS in Miami.

On July 12, 1988 (less than seven months after COMBS's grand jury testimony), COMBS and HAYES were indicted for RICO. The the Alameda Shipment and the Axel-D Shipment were the only predicate acts of the substantive RICO count applicable to COMBS and HAYES. In addition, COMBS and HAYES were both charged with conspiracy to import hashish for their role in the Axel-D Shipment, and COMBS was charged with conspiracy to import hashish for his role in the Alameda Shipment.

COMBS moved to dismiss the indictment on the basis of the government's use of immunized testimony. HAYES joined in the motion. The trial court ordered the magistrate to await the government's response and then hold a *Kastigar* hearing. The assistant United States Attorney prosecuting the case filed an unsworn response to the motion, in which he stated that all of the government's evidence against COMBS and HAYES was obtained prior to the time of

COMBS's Grand Jury testimony from an investigation which began in January 1986. According to the prosecutor, the investigation was both historical and pro-active. (The pro-active aspect of the investigation involved only the Axel-D Shipment.) Based on that response, the trial judge denied the motion to dismiss, thus reversing his prior order referring the motion to a magistrate. (A copy of the order is reprinted in the Appendix).[2]

After his conviction, COMBS filed, and HAYES joined, a post-trial motion for a *Kastigar* hearing. The trial judge denied the motion. He found that the record revealed that the government's evidence was derived from a source independent of the immunized testimony. (A copy of the post-trial order is reprinted in the Appendix as well).

No *Kastigar* hearing has ever been held in this case. *The trial judge has never reviewed COMBS's grand jury testimony.*

II. The Wiretaps[3]

Beginning approximately July, 1985, the United States Drug Enforcement Administration ("DEA") was involved in a joint investigation with several European police departments, coordinated through Interpol, regarding Dennis Howard Marks and certain members of the Marks Organization. In September, 1985, an informant notified the Spanish Central Brigade in Madrid, Spain, that Marks had plans to transport hashish to Spain and possibly on to Europe and America. A Spanish agent then prepared and

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[2]All motions, responses and orders relating to the *Kastigar* issue were originally under seal. At oral argument, the Eleventh Circuit panel unsealed them.

[3]The wiretaps were part of the pro-active investigation into the Axel-D Shipment.

filed a written request for authorization to wiretap three telephones in Marks's home in Palma de Mallorca, Spain.

Though the informant's information was used in the request for authorization, the Spanish judge was not advised of the identity of the informant. Under Spanish law, a police officer is not required to inform the Court as to how he obtained his information. The officer is only required to advise the Court of his conclusions. The Court will then trust the officer.

On December 19, 1985, a judge in Palma de Mallorca authorized the wiretap of Marks's telephones for a period of one month. The wiretap authorization was based solely on the unidentified informant's information and information received from Interpol regarding a telephone conversation between Marks and his wife regarding an intended shipment of hashish (this information most likely originated from a Dutch wiretap of two telephones used by Marks in Amsterdam).

Meanwhile, on November 3, 1985, DEA had Marks under surveillance at an airport in Karachi, Pakistan. In late November, DEA had Marks and other members of the Marks Organization under surveillance in Manila, Philippines.

At some point Special Agent Craig Lovato of the DEA began to assist the Spanish police in the investigation of Marks. (One DEA report reflects he too was involved as early as November.) Lovato listened to four reel-to-reel tapes containing conversations intercepted from Marks's telephones since the first week of January, 1986. He selected the conversations he believed were inculpatory, and copied onto cassette tapes any "drug related" conversations. He then returned the four tapes to the Spanish authorities, who erased them.

Lovato informed the Spanish authorities of the information he learned from the tapes, and then notified DEA of what he had learned. He returned to Madrid with the cassette tapes he made from the reel-to-reels. While in Madrid, at the request of the Spanish authorities Lovato ran a check on Marks.

Lovato recommended to his superiors that DEA send someone to assist the Spanish police to help them from drawing on their manpower. DEA sent a temporary assignment agent to Palma de Mallorca. This agent remained there for two weeks, working full-time on the wiretaps. He briefed Lovato on a daily basis.

When Lovato returned to Palma de Mallorca, the wiretaps became his primary responsibility. He remained in Palma for most of the duration of the wiretaps (about four-and-a-half months.)

Although the wire room was locked, Lovato had a key and access to the room to work at his leisure. He would listen to the entire reel-to-reel tape. He did not mininimize, i.e., he listened to conversations unrelated to illegal activities and not otherwise subject to interception. When the Spanish authorities created the reel-to-reels they did not minimize either. Rather, they recorded the intercepted conversations in their entirety and simply checked the tapes once a day or once every other day.

Lovato continued to copy onto cassettes those conversations he believed were inculpatory. He maintained the only copy of the cassettes in his briefcase.

By March, 1986, DEA had a "vested interest" in the wiretaps. Lovato's role changed once he learned there was a load of hashish headed for the United States: "[T]hat aspect of it became a U.S. based investigation."

Lovato began to make operational decisions concerning the wiretaps. He selected which conversations were to be preserved and which were to be erased. He used the information he learned from the wiretaps to determine where to conduct surveillances. Then, based on that information, he directed DEA surveillances in places such as Bangkok, Manila, Hong Kong, Singapore, Canada, England and the United States.

Lovato gave the Spanish authorities information on the translations on a daily basis. He also provided information about the identities and activities of those individuals appearing in the intercepted conversations. Lovato provided the Spanish with the information necessary to obtain extensions of the wiretaps.

Both COMBS and HAYES were parties to conversations regarding the Alameda Shipment intercepted as a result of the wiretaps. These intercepted conversations were introduced into evidence during trial and played to the jury.

REASONS FOR ALLOWANCE OF WRIT

This Court should grant this Petition because the Eleventh Circuit Court of Appeals has sanctioned so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Petitioners submit the following argument in support of their Petition.

ARGUMENT

I.

THE GOVERNMENT FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT ITS EVIDENCE WAS DERIVED FROM SOURCES INDEPENDENT OF COMBS'S IMMUNIZED TESTIMONY

Once COMBS established he testified under a grant of immunity, the government had "the heavy burden of proving all of the evidence it propose[d] to use was derived from legitimate independent sources." *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972). The government had to prove that none of the evidence presented to the grand jury or at trial was derived directly or indirectly from COMBS's immunized testimony. *United States v. Hampton*, 775 F.2d 1479, 1485-86 (11th Cir. 1985). The government did not meet its burden of proof.

The only response to the initial motion was an unsworn, unsubstantiated statement from an assistant United States Attorney that all of the government's evidence against COMBS was obtained prior to his immunized testimony. Based solely on that assertion, the trial judge reversed his prior order referring COMBS's motion to dismiss to a magistrate for a *Kastigar* hearing, and denied COMBS's motion. The potential consequences of such a ruling are frightening. The Fifth Amendment becomes meaningless. "[T]he very purpose of the Fifth Amendment under these circumstances is to prevent the prosecutor from transmogrifying into the inquisitor, complete with that officer's most pernicious tool — the power of the state to force a person to incriminate himself." *United States v. North*, 910 F.2d 843, 861 (D.C. Cir.), *reh'g granted in part and denied in part*, 920 F.2d 940 (1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2235 (1991). Under the trial judge's

ruling, a prosecutor has the power of Tomás de Torquemada. The unethical prosecutor can give use immunity to the target of an investigation, thus forcing the target to incriminate himself; he can then use the compelled testimony to indict the target, and later simply claim in cursory fashion that all of the government's evidence was obtained prior to the target's testimony or through other sources.

COMBS testified under use immunity about matters directly related to the prosecution at hand. Upon being indicted, COMBS was "not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Kastigar,* 406 U.S. at 460. COMBS did not have to take the prosecutor at his word. The government was required to come forward with some proof that its evidence was derived from a legitimate independent source. It came forward with none. The prosecutor's unsworn conclusory response was insufficient to meet the government's heavy burden under *Kastigar. United States v. Seiffert*, 463 F.2d 1089, 1092 (5th Cir. 1972) ("The prosecutor, the FBI agent who investigated the case, and the FDIC attorney all testified that they did not make direct nor indirect use of Seiffert's testimony. These conclusory statements are simply not enough to carry the burden.")

The *Kastigar* violation ultimately manifested in connection with the matter of Robert Stephenson. Stephenson was the only witness at trial who could link COMBS to the Alameda Shipment.[4] Yet, there is no evidence whatsoever in the record as to how the government came to learn of Stephenson. None of the agents who investigated the Alameda Shipment testified about him. In

[4]A link that was tentative at best. Stephenson testified that a person named "Scooby-doo" was involved; that he had met Scooby-doo twice; and that COMBS was Scooby-doo. However, Stephenson did not know the extent of COMBS's involvement.

fact, none of them testified about COMBS either. Therefore, the government had to have learned about both COMBS's and Stephenson's involvement through some other source. It is apparent that source was COMBS.

After COMBS testified in the grand jury, Stephenson learned COMBS was cooperating. It is intuitively obvious to the most casual observer that Stephenson was approached by the government and told of COMBS's cooperation. Stephenson then told the government about COMBS's role in the Alameda Shipment, and soon afterwards testified to the grand jury that indicted COMBS and HAYES.

The government has never explained away the problem of Robert Stephenson. It is an evidentiary hole that the government has never filled. A hole that should have been fatal to the indictment. *Hampton,* 775 F.2d at 1489.

COMBS and HAYES were entitled to their day in court. They were entitled to have the government prove the source of its evidence. The trial judge should never have based his decision on the prosecutor's conclusory assertion, but rather should have held an evidentiary hearing. At the very least, he should have reviewed COMBS's immunized testimony, *United States v. Williams,* 817 F.2d 1136, 1138 (5th Cir.), *cert. denied,* 484 U.S. 896 (1987), which he *never* did, before, during or after the trial.

The trial court departed from the strictures of *Kastigar.* The Eleventh Circuit sanctioned that departure. It ignored the issue. Its decision consisted of three words: "Per curiam: Affirmed." This Court should exercise its power of supervision and reverse the Eleventh Circuit. The district court should be ordered to hold a hearing in which the government shall offer whatever proof it may have as to the source of its evidence.

II.

THE FOURTH AMENDMENT RIGHTS OF COMBS AND HAYES WERE VIOLATED AS A RESULT OF THE JOINT VENTURE BETWEEN DEA AND THE SPANISH POLICE FORCE

The United States Constitution provides extraterritorial protection to United States citizens from the actions of the United States government. *Reid v. Covert*, 354 U.S. 1, 6 (1957); *Cf. United States v. Verdugo-Urquidez*, ____U.S.____, 110 S.Ct. 1056, 1063 (1990) ("Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding."). Consequently, while the Fourth Amendment does not apply to foreign searches by foreign officials of American citizens, *United States v. Rose*, 570 F.2d 1358, 1361 (9th Cir. 1978); *United States v. Rosenthal*, 793 F.2d 1214, 1230 (11th Cir.), *modified*, 801 F.2d 378 (1986), *cert. denied*, 480 U.S. 919 (1987), it does apply when American law enforcement participates to the extent that such a search is converted into a joint venture. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987); *Rosenthal*, 793 F.2d at 1231; *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); *United States v. Callaway*, 446 F.2d 753, 755 (3rd Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972).

The wiretaps installed on Marks's telephones in Palma de Mallorca, Spain, were the product of a joint venture between DEA and the Spanish police. It is immaterial whether the joint venture existed from the outset, or whether it was created after the wiretap was already in progress. *Lustig v. United States*, 338 U.S. 74, 79 (1949). DEA was investigating Marks before the wiretaps began, and DEA records reveal Lovato's involvement from the outset. The wiretaps were thus arguably a joint venture from the beginning. That notwithstanding, after Lovato listened to the first group of tapes, he became so intertwined in the

wiretaps that it was unquestionably converted into a joint venture.

Without Lovato, the wiretaps would have been useless to the Spanish police, and would have ceased. He translated the conversations for the Spanish police on a daily basis. These translations, along with the information he gave about the identities and activities of the various players, enabled the Spanish police to obtain extension orders.

Lovato aided the investigation by using information obtained from the wiretaps to direct surveillances of the Marks Organization throughout the world. Lovato made key operational decisions. He selected which conversations would be copied onto cassettes and preserved for later use, and which would be erased. He also had possession of the only copy of the cassettes. Lovato's involvement thus increased and the role of the Spanish police decreased. Eventually the Spanish police became Lovato's lackeys, responsible for nothing more than providing the equipment for the wiretaps and preparing the paperwork for the extension orders. The wiretaps were thus a textbook example of a joint venture, and COMBS and HAYES were entitled to Fourth Amendment protection with respect to their conversations intercepted by the wiretaps.

The wiretaps violated the Fourth Amendment rights of COMBS and HAYES. The affidavit in support of the wiretap authorization lacked any semblance of probable cause; Lovato did not minimize[5]; other investigative

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[5]Title III of the Omnibus Crime Control and Safe Streets Act of 1968 mandates that a wiretap be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception. . . ." 18 U.S.C. § 2518(5). This "minimization" provision, along with other Title III safeguards, "constitutes the congressionally designed bulwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in *Berger*

(Footnote continued on next page)

techniques were not exhausted[6]; and Lovato did not preserve all the taped conversations, but rather allowed potentially exculpatory conversations to be erased.

The district court departed from the accepted and usual course of proceedings by refusing to suppress the conversations of COMBS and HAYES intercepted from the wiretaps. The Eleventh Circuit sanctioned that departure. This Court should exercise its power of supervision and reverse the Eleventh Circuit's decision affirming the district court. The wiretap evidence should be suppressed.

(Footnote continued from previous page)
v. New York and *Katz v. United States.*" *Bynum v. United States*, 423 U.S. 952 (1975) (*cert. denied*) (Brennan, J., dissenting) (citations omitted). Minimization thus protects Fourth Amendment rights.

[6]Title III also requires that before a wiretap order may issue "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). This too is part of the congressional bulwark designed to protect Fourth Amendment rights. *Bynum*, 423 U.S. at 952 (Brennan, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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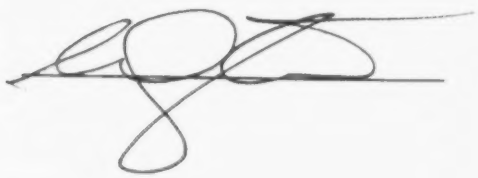
Attorneys for Petitioners
Ernest Franz Combs, Jr. and
Patricia Ann Hayes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was served by mail the 12th day of February, 1992, upon:

Anne R. Schultz
155 So. Miami Ave.
Miami, Florida 33130

Solicitor General
Department of Justice
Washington, D.C. 20530



Appendix

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5805

D. C. Docket No. 88-469-Cr-JCP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICIA ANN HAYES,
ERNEST FRANZ COMBS, JR.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(September 9, 1991)

Before FAY and JOHNSON, Circuit Judges, and MERHIGE*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Circuit Rule 36-1.

Judgment Entered: September 9, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karlus McNabb
Deputy Clerk

ISSUED AS MANDATE: NOV 25 1991

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*Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

[FILED DEC— 1 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-469-Cr-Paine

UNITED STATES OF AMERICA

v.

ERNEST FRANZ COMBS, JR.,

Defendant.

ORDER, UNDER SEAL,
DENYING DEFENDANT'S MOTION TO DISMISS

Before the Court is the motion of the defendant to dismiss the indictment because of alleged government's use of immunized testimony and statements for pretrial hearing and for discovery in advance of hearing. Having considered the content of this motion and the government's response thereto, it is

ORDERED and ADJUDGED that the defendant's motion to dismiss and his request for discovery in advance of the hearing be and the same are hereby denied. The motion of the defendant, the response of the government and this order are hereby sealed pending further order of the Court.

DONE and ORDERED at West Palm Beach, Florida this 28th day of November, 1988.

/s/ James C. Paine
United States District Judge

cc: Robert E. O'Neill, AUSA
Bruce J. Kelton, Esq.
Michael H. Artan, Esq.

[FILED JUN 21 1989]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0469-Cr-Paine

UNITED STATES OF AMERICA

v.

ERNEST FRANZ COMBS, JR.,
PATRICIA ANN HAYES,

Defendant.

ORDER ON PENDING MOTIONS

Before the Court are submissions by defendants, Ernest Franz Combs, Jr. and Patricia Ann Hayes, briefly described as follows. Defendants Combs and Hays [sic] have moved to vacate this Court's judgment following jury verdicts and to dismiss the action based on alleged government's use of immunized testimony and statements. This motion contains a prayer for a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972) and for discovery in advance of the *Kastigar* hearing. This motion was filed on May 18, 1989. Defendants Combs and Hayes have supplemented the motion described hereinabove by a submission filed June 12, 1989. Defendants Combs and Hayes have moved for a continuance of sentencing presently scheduled for July 7, 1989 so as to postpone the same beyond the proposed *Kastigar* hearing. This motion was filed June 6, 1989. The United States has responded to these submissions by pleading in opposition to the same.

The Court has reviewed these motions as well as the evidence produced at trial which resulted in the convictions of the moving defendants. It is the conclusion of the Court

that the record of this cause sufficiently shows that the evidence produced by the government in the trial of the defendant was obtained independently of information which may have been received by other prosecutorial authorities in the government in connection with a different investigation. It is, therefore,

ORDERED and ADJUDGED that the motions of these defendants which are the subject of this order, as noted hereinabove, be and the same are hereby denied. It is further

ORDERED that the motions, the response of the government and this order are to be sealed by the Clerk of the Court, pending further order of this court.

DONE and ORDERED at West Palm Beach, Florida this 20th day of June, 1989.

/s/ James C. Paine
United States District Judge

cc: Robert E. O'Neill, AUSA
Michael Artan, Esq.
Bruce Kelton, Esq.
Gregory A. Prebish, AFPD

(2)

No. 91-1330

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

ERNEST FRANZ COMBS, JR., AND
PATRICIA ANN HAYES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court should have held an evidentiary hearing before rejecting petitioners' claim that the government made improper use of petitioner Combs' immunized testimony.

2. Whether Drug Enforcement Administration agents violated petitioners' Fourth Amendment rights by assisting Spanish law enforcement officials in translating telephone conversations that were lawfully intercepted in Spain under Spanish law.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1330

ERNEST FRANZ COMBS, JR., AND
PATRICIA ANN HAYES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unreported, but the judgment is noted at 946 F.2d 903 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1991. A petition for rehearing was denied on November 15, 1991. The petition for a writ of certiorari was filed on February 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After separate jury trials in the United States District Court for the Southern District of Florida, petitioners were each convicted of participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and conspiring to import and distribute hashish from February 1985 through August 1, 1986, in violation of 21 U.S.C. 963. In addition, petitioner Combs was convicted of conspiring to import and distribute hashish from December 1983 through December 12, 1984, in violation of 21 U.S.C. 963. Combs was sentenced to 40 years' imprisonment and fined $50,000. Hayes was sentenced to eight years' imprisonment, to be followed by a five-year term of probation, and fined $10,000. The court of appeals affirmed without opinion. Pet. App. A1.

1. The evidence at trial showed that in the early 1970s petitioner Combs headed an organization that smuggled hashish and marijuana into the United States from Germany, Switzerland, the Netherlands, Afghanistan, India, and Pakistan. Beginning in late 1972, Combs and his associates imported Lebanese hashish into Los Angeles and Las Vegas in prefabricated speaker cabinets. In 1973, Combs and his associates imported 400 pounds of hashish hidden inside a crane boom. In 1974 or 1975, Combs had a load of oceanographic buoys filled with Thai marijuana shipped from Alaska to San Francisco. On three occasions from 1976 to late 1977, the Combs enterprise successfully imported 3,000 pounds of Thai marijuana. Gov't C.A. Br. 11-16.

In 1984, the dead body of Frederick Hilliard was discovered. Because Hilliard was working for a

naval contractor in Alameda, California, and had surveillance equipment and $36,371 in cash in his possession when he died, the Naval Investigative Service opened an investigation. That inquiry uncovered naval messages concerning two shipments of aircraft parts from Pakistan to the Naval Air facility in Alameda. Government agents seized the second shipment, which was found to consist of crates containing 4008 pounds of hashish. Investigators learned that the crates had been shipped from Pakistan by Howard Marks. Later, it was determined that Combs, Hilliard, and others participated in the operation. In 1985, Wyvonna Meyers picked up $60,000 to $70,000 from petitioners and delivered it to Marks in London. Gov't C.A. Br. 17-18.

In December 1985, based on a tip from a confidential informant, Spanish law enforcement authorities obtained a wiretap for telephones in Marks' residence in Palma, Spain. Some of the intercepted calls involved conversations between petitioners and Marks relating to drugs. Because the conversations were in English and used code words, the Spanish authorities asked the U.S. Drug Enforcement Administration for assistance. A DEA agent provided assistance in interpreting the tapes. As a result of that assistance, the DEA learned that Combs was involved in drug importation schemes and was staying at the Beverly Pavilion Hotel in Beverly Hills. In April 1986, following surveillance of Combs' activities, agents arrested Combs and searched his hotel room, finding $43,000 in cash and more than 500 grams of hashish. After Combs' arrest, petitioner Hayes assumed responsibility for collecting money from the importation scheme. Gov't C.A. Br. 18-21.

In 1987, Combs testified before a federal grand jury sitting in the Northern District of California.

In connection with Combs' appearance, the government agreed not to use his immunized testimony against him or against Hayes, his common-law spouse. Gov't C.A. Sealed Br. 1-2.[1]

2. On July 12, 1988, the instant indictment against petitioners was returned in the Southern District of Florida. Before trial, petitioners moved to dismiss the indictment, alleging that the government had made improper use of Combs' immunized testimony, and that the court should hold a hearing on that issue under *Kastigar* v. *United States*, 406 U.S. 441 (1972). In opposing that motion, the government represented that "the evidence against [petitioners] had been accumulated well before December 1987." Gov't Opposition to Defendant's Motion To File Under Seal and To Dismiss at 5, *United States* v. *Combs*, No. 88-469-Cr-PAINE(S) (S.D. Fla. Nov. 16, 1988).[2] The government also represented that the prosecutor in charge of this case had not been aware of Combs' cooperation in the unrelated California investigation until early 1988, and that the prosecutor did not possess information from Combs' grand jury appearance. Although the government did not trace particular items of evidence against petitioners to specific independent sources, the government offered to substantiate its contention at a hearing if the district court desired. *Id.* at 6. The court denied the motion to dismiss without an evidentiary hearing. It

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[1] At oral argument in the court of appeals, the court ordered the sealed filings in this case to be unsealed. See Pet. 4 n.2.

[2] The opposition explained the origins of the investigation in January 1986, with the DEA's assistance to Spanish law enforcement officials, and the further investigation by the DEA that led to Combs' arrest. Gov't Opposition, at 3-4, *supra*.

also denied petitioners' motion for reconsideration of that order. Gov't C.A. Sealed Br. 3-4.[3]

Following the guilty verdicts, petitioners renewed their claim that the government had made improper use of Combs' immunized testimony and again requested an evidentiary hearing. After reviewing the pleadings and the trial record, the district court denied that motion. The court stated that "the record of this cause sufficiently shows that the evidence produced by the government in the trial of the defendant was obtained independently of information which may have been received by other prosecutorial authorities in the government in connection with a different investigation." Order at 2 (June 21, 1989); Sealed Gov't C.A. Br. 2-4.

3. Prior to trial, petitioners also moved to suppress the evidence obtained from the Spanish wiretap. After an evidentiary hearing, the district court denied the motion. The evidence adduced at the hearing showed that Spanish law enforcement officers initiated an investigation of Marks based on a tip from a confidential informant. Thereafter, based on a factual showing of need for the wiretap, they obtained authority from a Spanish judge to conduct electronic surveillance of telephone lines at Marks' residence. The initial one-month authorization was

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[3] The court denied the motion for reconsideration after hearing testimony in connection with petitioners' motion to suppress evidence. That testimony indicated, *inter alia*, that (a) the Spanish wiretap, which was the source of all of the government's tape-recorded conversations involving petitioners, had ended in July 1986, and (b) the arrest of petitioner on April 9, 1986, and the seizure of hashish and money from him, resulted from surveillance and a search warrant. Gov't C.A. Sealed Br. 4 n.4.

extended each month until the Spanish police no longer had an interest in the investigation. Gov't C.A. Br. 4.

Because the intercepted conversations contained a considerable amount of jargon that the Spanish interpreter did not understand, the Spanish police requested assistance from the DEA. The DEA assigned Agent Craig Lovato of its Madrid office to assist the Spanish officials in interpreting the intercepted conversations. A Spanish police officer worked with Lovato. Lovato listened to all of the conversations, but copied only those relevant to drug trafficking. If a conversation was not drug related, Lovato would not listen to the entire conversation. Lovato's role was limited to translating the conversations; Spanish officials conducted the surveillance without assistance from DEA. Gov't C.A. Br. 5-6.

Eventually, Lovato realized that the intercepted conversations concerned a shipment of hashish to the United States, and he relayed that information to DEA's domestic and foreign offices. He also contacted agencies in various parts of the world seeking corroboration of evidence obtained from the surveillance. After translating the first four tapes, Lovato returned to Madrid and told his superiors that Marks appeared to be a significant trafficker. Nevertheless, the DEA decided against assigning an agent to Palma to continue translating the tapes on a daily basis. Instead, it was agreed that the Spanish police would deliver the tapes for translation to the DEA in Madrid. That arrangement did not prove effective, however, so the DEA assigned Agent Phil Needham to Palma for two weeks. Needham translated the intercepted conversations and discussed the calls with Lovato, who assisted in identifying the voices. The DEA assigned Lovato to Palma on a full-time basis after Needham returned to the United States. Gov't C.A. Br. 6-8.

4. On appeal, petitioners argued that the government had impermissibly used Combs' immunized testimony and that the district court should have suppressed the Spanish wiretap evidence. The court of appeals rejected both claims and affirmed petitioners' convictions without opinion. Pet. App. A1.

ARGUMENT

1. Petitioners contend (Pet. 8-10) that the government did not adequately establish that Combs' immunized testimony was not used against him and that the district court should have required the government to provide evidentiary support for its position.

This Court has held that the government bears the burden of establishing that testimony a defendant gives under a promise of use immunity is not directly or indirectly used in a subsequent prosecution against that defendant. *Kastigar* v. *United States*, 406 U.S. at 460. To meet that burden, the government must show by a preponderance of the evidence that its evidence in the subsequent prosecution was derived from a legitimate independent source. *Ibid.* Although *Kastigar* motions generally are resolved following adversary evidentiary hearings, a hearing is not required in every case; rather, the decision whether to grant a hearing lies within the discretion of the trial court. See *United States* v. *Dynaelectric Co.*, 859 F.2d 1559, 1580 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989); *United States* v. *Byrd*, 765 F.2d 1524, 1529 (11th Cir. 1985); *United States* v. *Provenzano*, 620 F.2d 985, 1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980).

In this case, the district court did not conduct a hearing before denying petitioners' pretrial *Kastigar* motion. The issue of whether the court erred in so doing, however, is now moot. In response to peti-

tioners' post-trial renewal of that motion, the district court reconsidered their claim in light of the evidence adduced at trial, and the court concluded that the trial evidence sufficiently demonstrated that all the government's evidence against them was obtained independently of the immunized testimony. In these circumstances, where the trial evidence satisfies the court that the government did not make any use of immunized testimony, a separate evidentiary hearing would be superfluous. See *Provenzano*, 620 F.2d at 1006 (no *Kastigar* hearing required in light of documents submitted by the government "conclusively demonstrat[ing] prior knowledge").

Further, drawing on the evidence at trial, the government's filings on appeal demonstrated the existence of independent sources for each of the offenses addressed in Combs' immunized testimony. Gov't C.A. Sealed Br. 5-7. Both courts below, therefore, have determined that the government established independent sources for its evidence against petitioners. The concurrent factual determination of those courts does not warrant this Court's review. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we * * * have been reluctant to disturb findings of fact in which two courts below have concurred.").

In the face of the lower court rulings, petitioners cite only a single item of evidence that they claim was a product of the alleged *Kastigar* violation—the testimony of cooperating witness Robert Stephenson implicating Combs in the Alameda shipment of hashish. Pet. 9.[4] The trial evidence did not reveal the

[4] Petitioner Combs discussed that shipment in his immunized testimony, but he makes no claim (Pet. 9-10) that he identified Stephenson or linked him to that shipment.

government's source for Stephenson or his testimony. Nor did the government specifically address that issue in written submissions in the courts below.[5] In the oral argument before the court of appeals, however, the government did address Stephenson's testimony, explaining that the government had learned of Stephenson's role in the Alameda operation a full two years before Combs gave his immunized testimony, and that, during the intervening period, the government had developed a very strong case against Stephenson. The government also raised the possibility of a remand to the district court for the purpose of allowing the government to set forth on the record its independent source for Stephenson's testimony. The court

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[5] That may be due to the manner in which the issue was briefed in those courts. Petitioners did not refer to Stephenson in their pretrial filings, nor in their initial post-trial motion to vacate. The first reference to Stephenson appeared *after* the government had filed its response to the post-trial motions. In Defendants' Supplement To Motion To Vacate Judgment, at 9, No. 88-0469-CR-PAINE (June 9, 1989), petitioners stated that "it also became known to various subjects of this investigation that Mr. Combs had in fact cooperated with the government," and gave as an "illustration of this" that Stephenson "was somehow made aware of Combs' cooperation" before being subpoenaed to testify before the grand jury. The factual basis for that claim was contained in an attached declaration of Combs' counsel, which stated that he was informed by Hayes' counsel "that on June 8, 1989, [Hayes' counsel] was informed by Dale Drozd, attorney for witness Robert Stephenson, that prior to his Grand Jury and trial testimony in the instant case, Mr. Stephenson and others were aware that defendant Combs had previously cooperated with the government." Att. to Defendants' Supplement, *supra*. On appeal, petitioners' opening brief devoted a page and a half to the *Kastigar* issue and did not mention Stephenson, whose testimony was first discussed in the reply brief. Pet. C.A. Br. 37-39; Pet. C.A. Reply Br. 9-10.

of appeals affirmed without requiring a remand on that point.

In our view, further proceedings on petitioners' *Kastigar* claim are not necessary. The district court's review of the trial record provides a sufficient basis for rejecting the bulk of petitioners' generalized claims of taint. As to petitioners' only specific claim, the government informed the court of appeals that it had an independent source for Stephenson's testimony, and in light of the information before it, the court of appeals did not believe a remand was necessary. There is no cause for this Court to disturb that discretionary ruling. If, however, this Court believes that it would be appropriate for the government to present evidence before a trier of fact to establish that Stephenson's testimony was not tainted through exploitation of Combs' immunized submissions, we would have no objection to a remand to the district court for that limited purpose.

2. Petitioners contend (Pet. 11-13) that the interception of their telephone conversations with Marks violated their Fourth Amendment rights. They acknowledge that the Fourth Amendment does not govern searches conducted by foreign law enforcement officers in their own countries, even if the targets are American. See *United States* v. *Rosenthal*, 793 F.2d 1214, 1230, modified, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Rose*, 570 F.2d 1358, 1361 (9th Cir. 1978). They argue, however, that that rule does not apply here because the interception of Marks' telephone conversations in Spain was "a joint venture between DEA and the Spanish police" (Pet. 11).[6]

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[6] Petitioners also suggest (Pet. 12-13 nn.5 & 6) that the wiretap evidence should have been excluded under Title III

Some courts have recognized an exception to the rule that the Fourth Amendment does not apply to searches conducted abroad by foreign officials when "Federal agents so substantially participate[] in the [search] so as to convert [it] into [a] joint venture[] between the United States and the foreign officials." *Stonehill* v. *United States*, 405 F.2d 738, 743 (1968), cert. denied, 395 U.S. 960 (1969). See also *Rosenthal*, 793 F.2d at 1231; *United States* v. *Hensel*, 699 F.2d 18, 25 (1st Cir.), cert. denied, 461 U.S. 958 (1983); *United States* v. *Callaway*, 446 F.2d 753, 755 (3d Cir. 1971), cert. denied, 404 U.S. 1021 (1972). But here the electronic surveillance was not a joint venture.

Spain initiated the wiretap of Marks without any request from the DEA, and the wiretap was conducted entirely by Spanish officials. The DEA's sole role, undertaken at the request of Spanish police, was to interpret the conversations obtained pursuant to the wiretap. Spanish authorities controlled the surveillance from start to finish, including the decision when to terminate it. Indeed, the Spanish head of the operation testified that any attempt by DEA to impose American legal standards on the Spanish would have been rejected. Gov't C.A. Br. 28. In these circumstances, the fact that DEA used the resulting information to initiate an investigation in the United States did not raise DEA's involvement to the level

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of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Title III, however, has no extraterritorial force. See *United States* v. *Peterson*, 812 F.2d 486, 492 (9th Cir. 1987); *Stowe* v. *Devoy*, 588 F.2d 336, 341 n.12 (2d Cir. 1978), cert. denied, 442 U.S. 931 (1979); *United States* v. *Cotroni*, 527 F.2d 708, 711 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976).

of a joint venture. Cf. *Kilday* v. *United States*, 481 F.2d 655, 656 (5th Cir. 1973) (upholding admission of evidence obtained during interrogations conducted by foreign officials, with American officials acting as interpreters, despite fact that *Miranda* warnings were not given); *Birdsell* v. *United States*, 346 F.2d 775 (5th Cir.), cert. denied, 382 U.S. 963 (1965) (upholding admission of evidence seized during a search by Mexican officials, with American law enforcement officer acting as interpreter).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

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[7] In any event, a foreign search jointly carried out by the foreign country and the United States in compliance with foreign law should not be regarded as unreasonable under the Fourth Amendment where, as in the case of Spain, the applicable foreign law requires judicial authorization to search based on an adequate showing of need. See *United States* v. *Peterson*, 812 F.2d at 490.

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